93-59

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELECTRICAL WORKERS' PENSION TRUST FUND OF LOCAL UNION #58, IBEW, ELECTRICAL WORKERS' JOINT BOARD OF TRUSTEES VACATION FUND, ELECTRICAL WORKERS' INSURANCE FUND, SUPPLEMENTAL UNEMPLOYMENT BENEFIT FUND OF THE ELECTRICAL INDUSTRY, DETROIT, MICHIGAN, IBEW LOCAL NO. 58 ANNUITY FUND, NATIONAL ELECTRICAL BENEFIT FUND, and the JOINT APPRENTICESHIP TRAINING TRUST FUND,
Petitioners,

-vs-

ELECTRIC ONE, INC., PAMELA R. R. RAITT and WILBERT ROBERTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals' disposition of Petitioners' civil contempt petition is erroneous and undermines the scope of remedies available to a multiemployer plan attempting to collect unpaid fringe benefit contributions under §502(a)(3) and §502(g)(2)(E) of the Employee Retirement Income Security Act of 1974 (ERISA)?

II. Whether the Court of Appeals' determination that Respondent, Electric One, Inc., had a defense to Petitioners' contempt petition based on its alleged financial inability to comply with the District Court's order was erroneous where no evidence was presented on this subject, no hearing was ever held and no judicial findings of fact were ever made?

III. Whether the Court of Appeals clearly erred in suggesting that policies embodied in the Bankruptcy Code preclude a creditor from resorting to a federal court's contempt powers to enforce a prior court order where the party against whom the contempt petition is brought has never formally petitioned for protection under the Bankruptcy Code?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Electrical Workers' Pension Trust Fund of Local Union #58, IBEW, Electrical Workers' Joint Board of Trustees Vacation Fund, Electrical Workers' Insurance Fund, Supplemental Unemployment Benefit Fund of the Electrical Industry, Detroit, Michigan, IBEW Local No. 58 Annuity Fund, National Electrical Benefit Fund, and the Joint Apprenticeship Training Trust Fund, respectfully request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on February 18, 1993.

OPINIONS BELOW

The February 18, 1993 opinion of the United States Court of Appeals for the Sixth Circuit is not reported. A copy of that opinion is contained in the attached Appendix, beginning at page 1a.

The written opinion of the District Court dated December 23, 1991, is not reported. A copy of that opinion is contained in the attached Appendix, beginning at page 6a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was rendered on February 18, 1993.

On May 6, 1993, Petitioners filed in this Court an Application to Extend Time to File Petition for Writ of Certiorari. On May 6, 1993, Associate Justice John Paul Stevens signed an Order extending the time for filing a Petition for Writ of Certiorari to July 16, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132(a)(3), provides:

> A civil action may be brought -
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 502(g)(2)(E) of ERISA, 29 U.S.C. §1132(g)(2)(E), provides:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan -
>
> * * *
>
> (E) such other legal or equitable relief as the court deems appropriate.

Section 515 of ERISA, 29 U.S.C. §1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

Electric One, Inc. (hereinafter: "Electric One") is an electrical contractor which was a party to a collective bargaining agreement with Local Union No. 58 of the International Brotherhood of Electrical Workers (hereinafter: "Local 58"). Under the terms of that agreement, Electric One was obligated to file fringe benefit contribution reports and make fringe benefit contributions on behalf of those of its employees who were represented by Local 58. These contributions were to be paid directly to the Petitioners, seven trust funds established under and administered pursuant to federal law.

Electric One breached the fringe benefit provisions of the collective bargaining agreement it signed by failing to submit the required contribution reports and failing to pay all contributions owed. Pursuant to the grievance arbitration provision of that agreement, Local 58 filed a grievance against Electric One in March 1989.

Following a hearing on the grievance, a Joint Labor-Management Committee issued an award which directed Electric One to cure all existing delinquencies under the fringe benefit provisions of the agreement. Additionally, the award directed Electric One to "hereafter [file] all reports and [pay] all fringe benefit contributions on a timely basis as required by [the collective bargaining agreement]." Award of the Labor-Management Committee, App. 19a.

Electric One did not comply with the arbitration award. As a result, on October 6, 1989, Petitioners instituted this suit to enforce the award in the United States District Court for the Eastern District of Michigan. The jurisdiction of the District Court was predicated on §301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185, and §502(g)(2) and §515 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §1132(g)(2) and 1145.

On May 24, 1990, a judgment enforcing the arbitration award was entered against Electric One. That judgment provided in pertinent part:

> The award of the Joint Labor-Management Committee... be, and it is hereby, adopted, ratified and confirmed. *Defendant Electric One, Inc., shall fully comply with the said award*".
>
> Judgment Against Defendant Electric One, App. 18a (emphasis added).

After entry of the judgment against it, Electric One continued to violate the fringe benefit provisions of the collective bargaining agreement it had signed. In so doing, Electric One also violated the terms of the District Court's judgment. Because of these violations of the agreement, all of which occurred subsequent to the entry of judgment, Petitioners filed a motion requesting that Electric One and its two principal officers, Pamela R. R. Raitt and Wilbert Roberts, be adjudicated in civil contempt for the failure of Electric One to comply with the terms of the judgment entered on May 24, 1990.

The District Court originally referred the Petitioners' motion to a United States Magistrate Judge who, on July 23, 1991, issued an order denying Petitioners' request (App. 15a). Petitioners took an appeal from this decision to the District Court.

On December 23, 1991, the District Court issued a written opinion refusing to find Electric One or its principal officers in contempt of Court (App. 6a). In its written opinion, the District Court cited two reasons for its conclusion.

The District Court first held that the remedy of civil contempt for violation of the Court's May 24, 1990 judgment was inappropriate because the original judgment lacked specificity. District Court Opinion, App. 10a. The District Court further indicated that it was exercising its discretion not to adjudicate Electric One or its officers in contempt because of "[t]he availability of a less harsh avenue of legal relief." District Court Opinion, App. 11a. Thus, the District Court ruled that Petitioners' ability to file another Complaint against Electric One and obtain another judgment for unpaid fringe benefit contributions militated against a finding of contempt.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. On February 18,

1993, a panel of that Court issued an opinion affirming the District Court's determination (App. 1a). The Sixth Circuit based its conclusion on several factors. It noted that, "the District Court determined that Electric One was not in strong financial shape and its ability to pay the fringe benefit contributions was not assured." Court of Appeals Opinion, App. 3a. The Sixth Circuit further held that, "the [Petitioners] had an adequate remedy for breach of the collective bargaining agreement because they could sue for breach of the collective bargaining agreement whenever Electric One failed to pay contributions or failed to file the appropriate reports." *Id.*, App 3a. Finally, the Sixth Circuit found that the District Court properly rejected a contempt remedy under these circumstances because "allowing some creditors of a financially-strapped corporation to use the weapon of contempt against the officers of the corporation for failure to pay contributions promotes an unfair distinction between creditors which thwarts the purpose of the Bankruptcy Code." *Id.*, App. 4a.

ARGUMENT

The Court of Appeals' ruling in this case represents a significant decision which raises serious questions concerning the ability of trust funds, established under and administered pursuant to federal law, to collect fringe benefit contributions owed pursuant to a collective bargaining agreement. The Court of Appeals' conclusion that civil contempt was inappropriate was based on several different rationales, all of which are erroneous and all of which contain significant ramifications for cases attempting to enforce provisions of ERISA.

I.
THE COURT OF APPEALS' CONCLUSION THAT A CIVIL CONTEMPT REMEDY IS UNAVAILABLE WHERE ALTERNATIVE REMEDIES ARE AVAILABLE IS ERRONEOUS AND UNDERMINES CONGRESSIONAL INTENT EMBODIED IN 29 U.S.C. §1132(a)(3) AND 29 U.S.C. §1132(g)(2)(E).

The Sixth Circuit ruled in this case that a citation for civil contempt against Electric One and its principal officers was not

available because Petitioners had another remedy which they could invoke to collect the fringe benefit contributions owed by Electric One. According to the Sixth Circuit, Petitioners had an alternative legal remedy; they could have filed another suit to collect any unpaid fringe benefit contributions owed by Electric One from the date of the entry of the original judgment, and obtain a judgment in that case.

The Sixth Circuit's reliance on the existence of an alternative remedy to defeat a claim for civil contempt is not only completely contrary to a prior decision of this Court, but would also substantially undermine one of the principal components of the remedial scheme which Congress has established in ERISA for trust funds such as Petitioners attempting to collect unpaid fringe benefit contributions.

In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court explicitly rejected a similar argument in comparable circumstances. *McComb* involved a cause of action filed against an employer to enforce provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, *et seq.* The plaintiff in *McComb* secured an injunctive decree ordering the defendant to comply with the minimum wage, overtime and record keeping provisions of the FLSA. When the defendant employer failed to comply with that injunction in all respects, the plaintiff instituted a contempt proceeding in which he requested that the defendant be compelled to purge itself of contempt by paying the amount of unpaid wages owed to its employees.

This Court in *McComb* found the contempt remedy sought by the plaintiff to be appropriate in these circumstances. In so doing, this Court considered and rejected the employer's argument that a contempt remedy was not available because an alternative suit could have been brought under the FLSA to collect the unpaid wages at issue in that case. The *McComb* Court held:

> The direction of the court was that respondents make payments of wages to their employees pursuant to a prescribed formula. If the court is powerless to require the

> prescribed payments to be made, it has lost the most effective sanction for its decree and a premium has been placed on violations. *The fact that another suit might be brought to collect the payments is, of course, immaterial. For the court need not sit supinely by waiting for some litigant to take the initiative.* Vindication of its authority through enforcement of its decree does not depend on such whimsical or fortuitous circumstances.
>
> 336 U.S. at 194 (emphasis added, footnote omitted).

As *McComb* demonstrates, the availability of another remedy for Petitioners does not foreclose them from relying on the court's power to enforce the provisions of its prior judgment by means of civil contempt.

There is, moreover, a much broader concern raised by the Sixth Circuit's reliance on the availability of an alternative remedy to defeat Petitioners' contempt request. Clearly, the remedy available to the Petitioners to collect any unpaid fringe benefit contributions is that provided in §515 of ERISA, 29 U.S.C. §1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The civil enforcement of the obligations imposed by §515 is provided for in §502 of ERISA, 29 U.S.C. §1132, which provides an array of remedies for an employer's violation of §515. Most notably for purposes of the present case is that §502 provides in two different subsections for the award of injunctive relief against an employer who fails to pay all fringe benefit contributions owed. First, §502(a)(3), 29 U.S.C. §1132(a)(3), provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary *(A) to enjoin any act or practice which violates any provision of this subchapter* or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> *Id.* (emphasis added).

In addition, §515 of ERISA compels employees, such as Electric One, to make all contributions owed to a multiemployer plan in strict conformity with the provisions of a collective bargaining agreement. Section 502(g)(2)(E) of ERISA, 29 U.S.C. §1132(g)(2)(E), specifically addresses the relief available to fiduciaries in an action filed under §515. That subsection indicates that among the relief which a court may award in cases filed under §515 is "such other legal or equitable relief as the court deems appropriate."

Thus, under two separate provisions contained in §502 of ERISA, a federal court has the authority to enjoin any conduct in violation of ERISA and, more specifically, conduct which violates the payment provisions of §515. The importance of these remedial provisions to the overall statutory scheme established by Congress in ERISA has previously been recognized by this Court. In *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987), this Court stated that the enforcement scheme provided in §502(a), "is one of the essential tools for accomplishing the stated purposes of ERISA." 481 U.S. at 52. Similarly, in *Laborers Health And Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), the Court described the significance of the remedies provided in §502(g)(2) as follows:

> Congress was also concerned about the problem that had arisen because a substantial number of employers had failed to make their "promised contributions" on a regular and timely basis. Sections 515 and 502(g)(2) of ERISA, the provisions at issue in this case, were enacted in response to that concern ...
>
> * * *

> The legislative history of these provisions explains that Congress added these strict remedies to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts.
>
> 484 U.S. at 546-547.

In §502 of ERISA Congress has provided for broad remedial powers to accomplish the purposes of ERISA. Clearly, among the remedies available to a court under this provision is the issuance of injunctive relief to cure violations of ERISA, including a specific provision allowing for injunctive relief for violations of §515 of ERISA. Federal courts have recognized this fact and have consistently ruled that an injunction may issue against an employer who fails to make payments owed to a multiemployer plan under the terms of a collective bargaining agreement. *Gould* v. *Lambert Excavating, Inc.*, 870 F.2d 1214, 1217 (7th Cir. 1989); *Anthony* v. *Texaco, Inc.*, 803 F.2d 593, 598 (10th Cir. 1986); *Laborers Fringe Benefit Funds - Detroit and Vicinity* v. *Northwest Concrete & Construction, Inc.*, 640 F.2d 1350, 1352-1353 (6th Cir. 1981); *Teamsters Local 639 - Employers Trust* v. *Jones & Artis Construction Co.*, 640 F. Supp. 223 (D.D.C., 1986); *Robbins* v. *Labar Transportation Corporation*, 599 F. Supp. 705 (N.D. Ill. 1984); *Van Drivers Union Local 392* v. *Neal Moving & Storage*, 551 F. Supp. 429 (N.D. Ohio 1982).

The language and legislative history of §502 of ERISA, as well as the decisions which have construed that provision, demonstrate that injunctive relief may issue for the failure of an employer to make contractually owed fringe benefit payments to a multiemployer plan. However, the Court of Appeals' ruling in this case that the contempt power of a federal court may not be used to enforce an equitable decree where an alternative remedy exists, completely nullifies the injunctive relief Congress provided for in §502.

Under §502(a) and §502(g)(2)(E) of ERISA, Congress has explicitly allowed for equitable remedies in cases brought to enforce §515. Yet, if the Court of Appeals decision in this case were correct, while a federal court would be authorized to issue such an

injunctive decree, that court could never enforce such a decree through its contempt powers. This result automatically follows precisely because any plaintiffs who have obtained equitable relief under §515 and §502 will always have an alternative remedy under federal law - another suit to collect any additional unpaid fringe benefit contributions brought pursuant to §515.

It cannot be denied that ERISA provides federal courts with the power to issue an injunction in cases of this type. It is, however, axiomatic that "[o]nce issued, an injunction may be enforced." *Hutto* v. *Finney,* 437 U.S. 678, 690 (1978). The enforcement of injunctive orders ordinarily rests with the court's contempt power. Such power has been characterized by this Court as the sanction "which a judge must have and exercise in protecting the due and orderly administration of justice", *Roadway Express, Inc.* v. *Piper,* 447 U.S. 752, 764 (1980), and one which is "essential to ensuring that the Judiciary has a means to vindicate its own authority . . ." *Young* v. *United States ex rel. Vuitton et. Fils S.A.,* 481 U.S. 787, 796 (1987). Without the authority to act promptly and independently through use of the contempt power, federal courts "could not administer public justice or enforce the rights of private litigants" *Gompers* v. *Black Stove & Range Company,* 221 U.S. 418, 450 (1911).

Congress has, therefore, explicitly provided that federal courts may enforce the important policies underlying ERISA through the issuance of injunctive decrees. However, the Court of Appeals' insistence in this case on Petitioner's exhaustion of available remedies effectively forecloses a finding of contempt in any case of this type. In so doing, the Court of Appeals' decision completely negates the injunctive remedy provided for by Congress in these cases.

The difficulty created for Petitioners and other multiemployer plans by the decision arrived at in this case is perhaps best demonstrated by comparing the result reached herein with the observations made by the Sixth Circuit in its prior decision in *Northwest Concrete, supra.* In that case, the Sixth Circuit ruled that the equitable remedy provisions of §502(a)(3) allowed for the issuance of an injunction against an employer for failing to make all fringe benefit contributions it was obligated to make under the

terms of a collective bargaining agreement. In arriving at this conclusion in *Northwest Concrete,* the Sixth Circuit relied on the legislative history of §502(a)(3):

> The legislative history underlying section 502 indicates that *Congress intended that the enforcement provisions should have teeth: the provisions should be liberally construed "to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act."* H.R. Rep. No. 93-533, 93d Cong., 2nd Sess. 17, reprinted in [1974] U.S. Code Cong. & Ad. News, p. 4639, 4655. This history further states that "[t]he intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.
>
> 640 F.2d at 1352 (emphasis added).[1]

As the Sixth Circuit observed in *Northwest Concrete,* the injunctive provisions of ERISA must have teeth if the important policy concerns expressed in that Act are to be served. What is most notable about the instant case, however, is that the important injunctive remedy which Congress has made available in an action

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[1] The Sixth Circuit in *Northwest Concrete* addressed the injunctive powers of a District Court in an ERISA action only with respect to §502(a)(3) of ERISA, not §502(g)(2)(E) of that Act. The reason for this lies in the effective date of the latter provision.

Section 515 of ERISA and §502(g)(2)(E) were part of the 1980 amendments to ERISA. Thus, when an injunction was originally requested in *Northwest Concrete,* the only statutory basis for such a remedy was §502(a)(3). As a result, the only injunctive provision discussed in *Northwest Concrete* was §502(a)(3).

However, as several decisions of this Court clearly demonstrate, the legislative history of the 1980 amendments demonstrates that the remedies provided in §502(g)(2), including its injunctive provisions, were also designed to have considerable force. *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co., Inc.,* 484 U.S. at 546-549; *Kaiser Steel Corp.,* v. *Mullins,* 455 U.S. 72, 87 (1982). As this Court has recognized, these amendments were prompted by a Congressional concern that the collection of delinquent fringe benefit contributions was becoming unnecessarily cumbersome and costly, *Advanced Lightweight Concrete, supra* at 547, fn. 14, and a desire to allow "the trustees of plans to recover delinquent contributions efficaciously." *Id.*

brought to enforce §515 of ERISA has been rendered completely toothless because the mechanism for the enforcement of such injunctive orders has been effectively eliminated. While injunctions to enforce violations of §515 may be issued under §502, litigants who have obtained such injunctions in the Sixth Circuit are entirely powerless to enforce them by means of the court's contempt power because an alternative remedy will *always* be available in the form of a new cause of action to collect unpaid contributions under §515.

The Court of Appeals' determination that civil contempt is unavailable because of the existence of an alternative legal remedy in this case is, therefore, seriously flawed for two reasons. The Sixth Circuit's decision is directly contrary to this Court's decision in *McComb, supra.* The Court of Appeals disposition of this case also completely undermines the injunctive remedies explicitly provided by Congress in §502(a)(3) and §502(g)(2)(E) of ERISA.

II.
THE COURT OF APPEALS ERRED IN DETERMINING THAT CONTEMPT WAS NOT APPROPRIATE ON THE GROUND THAT ELECTRIC ONE WAS NOT FINANCIALLY ABLE TO PAY THE AMOUNT OF FRINGE BENEFIT CONTRIBUTIONS OWED.

The Court of Appeals also ruled that civil contempt was not an appropriate remedy in this case because of Electric One's financial inability to comply with the District Court's original order against it. Court of Appeals Opinion, App 3a. The Court of Appeals' reliance on this factor is clearly erroneous as a factual matter and contrary to numerous reported appellate decisions on this subject.

The Sixth Circuit ruled that civil contempt was not an appropriate remedy in this case because "the district court *determined* that Electric One was not in a strong financial shape and its ability to pay the fringe-benefit contributions was not assured." Court of Appeals Opinion, App. 3a (emphasis added). This aspect of the Court of Appeals ruling is patently erroneous in asserting that

the District Court "determined" that Electric One was in a weak financial condition. In actuality, no showing of Electric One's inability to pay the amounts owed under the injunctive provisions of the District Court's judgment was ever made; no hearing was ever conducted on this issue; and no judicial findings were ever announced on this question.

Indeed, the only reference to Electric One's financial status was contained in pleadings filed on behalf of Electric One when Petitioners' contempt motion was referred to a magistrate judge. In pleadings filed before the magistrate judge, Electric One asserted in general terms it did not have the resources to pay the full amount of the fringe benefit contributions it owed under the terms of the judgment. No affidavit or other evidence to substantiate this assertion was presented to the magistrate judge. The magistrate judge did not conduct a hearing on Electric One's claim of financial inability to comply with the judgment, nor did he pursue these allegations in any way. Furthermore, when the magistrate judge arrived at his decision to deny Petitioners' request for a finding of civil contempt, he did so for reasons totally removed from the unsupported allegations relating to Electric One's financial condition.

On the appeal of the magistrate judge's decision, the District Court made some reference to Electric One's allegation of financial inability to pay the fringe benefit contributions owed, but the District Court expressly declined to premise its ruling on that basis. The District Court, after describing in the text of its opinion the reasons for denying the Petitioners' motion, added the following observation in a footnote:

> In addition, there are strong indications that Electric has a valid affirmative defense of financial inability to comply. *See United States* v. *Lay,* 779 F.2d 319 (6th Cir 1985). ***However, since the magistrate judge did not make a finding of fact with regard to this issue, we do not rely upon this factor in affirming the order denying plaintiff-appellants' motion.***
>
> District Court Opinion, fn. 11, App. 11a, (emphasis added).

Thus, neither the magistrate judge nor the District Court took evidence on the issue of Electric One's financial ability to pay the fringe benefit contributions owed under the Court's judgment; neither the magistrate judge nor the district court made any findings with respect to Electric One's financial condition; and neither the magistrate judge nor the District Court relied on Electric One's financial inability to make the payments in rendering the decision to deny the Petitioners' contempt motion.

Despite these facts, the Sixth Circuit ruled that contempt was not an appropriate remedy in this case because the district court had "determined that Electric One was not in a strong financial shape", and because Electric One's ability to pay the contributions owed under the terms of the judgment "was not assured." Court of Appeals Opinion, App. 3a.

The Sixth Circuit was, therefore, completely incorrect factually in suggesting that the District Court had made any determination with respect to Electric One's financial condition. There is, however, a second error in the Court of Appeals ruling on this point. That error is based on the Sixth Circuit's apparent conclusion that Electric One was entitled to a valid defense in any contempt proceeding simply by demonstrating that its ability to pay the contributions in question "was not assured." Court of Appeals Opinion, App. 3a.

It is well established that a party against whom a civil contempt proceeding is instituted may defend on the basis of a present inability to comply with the court's order. *United States* v. *Rylander,* 460 U.S. 752, 757 (1983); *United States* v. *Bryan,* 339 U.S. 323, 330 (1950). It is equally clear that the party raising such a defense has the burden of production with respect to that inability to comply. *Rylander,* 460 U.S. at 757.

That burden of production compels the party raising this defense to "produce detailed evidence specifically explaining why he cannot

comply", *United States* v. *Roberts,* 858 F.2d 698, 701 (11th Cir. 1988), so as to substantiate the claimed inability to comply "plainly and unmistakably." *Donovan* v. *Sovereign Security, Ltd.,* 726 F.2d 55, 59 (2nd Cir. 1984); *Hodgson* v. *Hotard,* 436 F.2d 1110, 1116 (5th Cir. 1971). Thus, as recognized by the First Circuit Court of Appeals in *Fortin* v. *Commissioner of the Massachusetts Department of Public Welfare,* 692 F.2d 790 (1st Cir. 1982), the burden faced by a litigant who claims an inability to comply with a prior court order, "is difficult to meet." *Id.* at 796.

In stark contrast to these decisions from other circuits, the Sixth Circuit held in this case that Electric One met its burden simply by alleging without substantiation that it was unable to pay the amounts specified in the judgment, thereby demonstrating that its ability to pay "was not assured." This ruling is in direct conflict with this Court's decision in *Rylander* which places the burden of production on this defense squarely on Electric One. The Sixth Circuit's ruling is also directly in conflict with the decisions of other federal appeals courts which have universally held that a party defending against a contempt motion must demonstrate the inability to comply with a court order "plainly and unmistakably."

The Sixth Circuit's analysis of the scope of any defense based on Electric One's financial inability to comply with the District Court's judgment is unprecedented. The Sixth Circuit's resolution of this issue is also particularly dangerous when considered against the background of the important public policy concerns served by an action of this type filed under ERISA.

As noted previously, other than general allegations of financial inability to comply with the judgment, Electric One offered no proof that it was unable to pay the amount of fringe benefit contributions ordered by the District Court. However, even if Electric One had met the burden established by this Court in *Rylander* and demonstrated that it was not capable of paying the amount of fringe benefit contributions it owed pursuant to the

judgment, there are other factors relating to that corporation's financial condition which would have to be considered by the District Court.

There may be numerous reasons why an electrical contractor such as Electric One could find itself in a precarious financial condition, unable to make the fringe benefit contributions which it has been ordered to pay. On the one hand, such a contractor may have been intent on making a good faith effort to comply with the payments prescribed in a court order, but, because of unanticipated events or events beyond its control, that employer may find itself incapable of paying the amounts owed. On the other hand, there may be other employers who could calculatingly use the defense of financial inability to comply with a court order to defeat any attempt to enforce an injunctive order through the contempt process. Such an employer could, for example, bid on future projects with the assumption that it would not be paying any or all of the fringe benefit contributions it was obligated to pay. Such a contractor could, in this manner, guarantee and perpetuate its financial inability to pay any fringe benefit contributions which a court has ordered paid.

It is, therefore, critically important that a District Court, faced with a defense to a contempt proceeding based on financial inability to comply, conduct a far more extensive examination of the relevant facts than took place in this case. This is particularly true in an ERISA action such as this where Petitioners, in attempting to collect the fringe benefit contributions owed in this case, stand in the shoes of Electric One's workers. These workers, in essence, extend credit without collateral for every hour they work. The Petitioners are, however, involuntary creditors who lack the ability to protect themselves fully if the debtor - the employer - defaults on his obligations. A bank loaning money to an individual or corporation might well insist on security for its loan or the personal guarantee of corporate owners. Petitioners do not have this luxury. Absent the employer's voluntary compliance with the fringe benefit terms of a collective bargaining agreement, Petitioners' remedies

are those outlined in §515 and §502 of ERISA. And, in some situations, the injunctive remedy expressly provided in §502(a)(3) and §502(g)(2)(E) offers the only meaningful remedy available to Petitioners against an employer intent upon shirking its responsibilities under the fringe benefit provisions of a collective bargaining agreement.

Under the Sixth Circuit's decision in this case, creditors of multiemployer jointly administered trust funds may be provided with an incentive to accumulate large debts to such funds while a lawsuit is pending, and, when it becomes necessary, abandon the debt-laden, worker subsidized corporate form and begin a new corporation. The injunctive provisions contained in §502 of ERISA were designed to prevent this scenario. But, by emasculating the court's contempt enforcement powers, the Sixth Circuit's decision in this case undermines virtually all impact of any injunctive decrees and eliminates what may in certain cases be the only effective remedy available to Petitioners and the individuals the Petitioners represent.

III.
THE COURT OF APPEALS ERRED IN SUGGESTING THAT PUBLIC POLICY CONCERNS PREMISED ON THE BANKRUPTCY CODE SUPPORTED THE DENIAL OF PLAINTIFFS' PETITION FOR CONTEMPT.

The final rationale offered by the Court of Appeals' for its decision denying Petitioners' contempt petition was that allowing some creditors of a financially troubled company to use the contempt remedy promotes an unfair distinction between creditors and thereby runs contrary to the purposes of the Bankruptcy Code. Court of Appeals Opinion, App. 4a.

This argument was based on the apparent assumption, totally unsupported by the record in this case, that Electric One was in such a precarious financial condition that its resort to the

protections of the Bankruptcy Code was contemplated and/or imminent.[2] There is nothing in the record developed in this case to support the view that Electric One was on the road to bankruptcy. For this reason, the Court of Appeals' determination that the contempt remedy was unavailable to Petitioners because of policies stated in the Bankruptcy Code is mystifying.

The Sixth Circuit's ruling on this issue was premised on its apparent conclusion that the contempt remedy sought by Petitioners created an unfair distinction between various creditors. Petitioners would concede that there is a distinction between the amounts owed by Electric One to the Petitioners and any amounts presumably owed by Electric One to other creditors. This distinction, however, is neither "unfair" as the Court of Appeals found, nor in violation of the policies underlying the Bankruptcy Code. What distinguishes the debt which forms the basis for Petitioners' contempt petition from the amounts presumably owed by Electric One to its other creditors is that the debt to Petitioners is the subject of a valid injunctive order issued by a federal court.

If, as the Sixth Circuit found, the Bankruptcy Code precludes a contempt finding in these circumstances, an employer subject to an injunctive order rendered under §502(g)(2)(E) would be completely immune from the one enforcement mechanism available to a federal court in these circumstances. Under the Sixth Circuit's ruling in this case, such an employer need not even establish a complete inability to satisfy the terms of the judgment; that

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[2] As noted previously, in this case no evidence was presented and no findings were ever made with respect to Electric One's financial condition. Thus, to the extent the public policy concerns relied on by the Sixth Circuit were based on the fact that Electric One was "financially strapped", that ruling is without support in the record. Moreover, since no evidence of Electric One's financial condition was ever presented to the District Court or the magistrate judge, it is just as reasonable to assume that the time the contempt petition was filed, Petitioners represented Electric One's *only* creditor. The Sixth Circuit's decision based on policies embodied in the Bankruptcy Code, therefore, is premised on two substantial assumptions — that Electric One was in a precarious financial condition unable to comply with the terms of the judgment and that Electric One, because of that condition, had creditors other than Petitioners.

employer need only cite the "policy" embodied in the Bankruptcy Code and thereby establish that the trust funds are attempting to secure an unfair advantage over other potential creditors.

The Court of Appeals ruling on this point also substantially misperceives the "policy" of the Bankruptcy Code. Absent a formal bankruptcy petition, preferential payments to selected creditors are entirely legal under both federal and state law. Thus, until the provisions of the Bankruptcy Code are formally invoked, a corporation such as Electric One maintains the ability to select the creditors to be paid.

CONCLUSION

Based on the foregoing, Petitioners, Electrical Workers Trust Fund of Local Union No. 58, IBEW, *et al.*, respectfully request that the Court issue a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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ROLLAND R. O'HARE and
MARK GRANZOTTO
Attorneys for Petitioners

Dated: July 6, 1993

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELECTRICAL WORKERS' PENSION TRUST FUND OF LOCAL UNION #58, IBEW, ELECTRICAL WORKERS' JOINT BOARD OF TRUSTEES VACATION FUND, ELECTRICAL WORKERS' INSURANCE FUND, SUPPLEMENTAL UNEMPLOYMENT BENEFIT FUND OF THE ELECTRICAL INDUSTRY, DETROIT, MICHIGAN, IBEW LOCAL NO. 58 ANNUITY FUND, NATIONAL ELECTRICAL BENEFIT FUND, and the JOINT APPRENTICESHIP TRAINING TRUST FUND,
Petitioners,

-vs-

ELECTRIC ONE, INC., PAMELA R. R. RAITT and WILBERT ROBERTS,
Respondents.

APPENDIX

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Nos. 92-1074/92-1106
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELECTRICAL WORKER'S PENSION FUND, *et al.*,
Plaintiffs-Appellants,
v.
ELECTRIC ONE, INC., PAMELA R. R. RAITT, and WILBERT ROBERTS,
Defendants-Appellees,

AND

ELECTRICAL WORKER'S PENSION FUND, *et al.*,
Plaintiffs-Appellants,
v.
MARTIN H. MASLOWE, d/b/a MASLOWE & CO.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: MERRITT, Chief Judge; and MARTIN and MILBURN, Circuit Judges.

PER CURIAM. Electric One and Local 58 of the International Brotherhood of Electrical Workers entered into a collective-bargaining agreement. The agreement provided that Electric One was obligated to file reports regarding employees' fringe benefits and to pay the Electrical Workers' Pension Trust Fund and other trust funds for employees' fringe benefits.

Without doubt, Electric One breached the reporting and contribution requirements of the collective-bargaining agreement. The union filed a grievance which went to arbitration where it was held that Electric One had breached the contract. The arbitration

award directed Electric One to cure all delinquencies and "hereafter [file] all reports [and pay] all fringe benefit contributions on a timely basis as required by Article VIII [of the collective bargaining agreement]."

Electric One did not comply with the arbitrator's decision and the Funds filed suit to enforce the arbitration award. Judgment was entered for the Funds and Electric One was ordered to fully comply with the arbitration award.

Electric One, after the judgment, failed to file the requisite reports and eventually ceased making contributions to the Funds. The Funds then filed suit in federal district court against Electric One and its principal officers, Pamela R. R. Raitt and Wilbert Roberts, for civil contempt of court. Electric One paid the Funds the money that was due but did not file the appropriate reports. The district court referred the contempt proceeding to a magistrate, and the magistrate denied the Funds' request to have Electric One and its officers declared in contempt of court. The district court affirmed the magistrate.

The Funds now appeal the district court's refusal to hold Electric One and its principal officers in civil contempt for failing to comply with the prior judgment, which mandated that Electric One file reports regarding fringe benefits and to pay them.

Martin H. Maslowe, doing business as M.H. Maslowe & Co., was a signatory to the same collective-bargaining agreement as Electric One. He also failed to abide by the reporting and payment requirements of the agreement, lost at arbitration, and was ordered by the arbitrator to promptly file all future reports and pay all required future contributions. In June 1991, the Funds sued in federal district court under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, to enforce the arbitrator's decision. Maslowe did not file an answer and the Funds moved for a default judgment against Maslowe. The district court advised the Funds that it would not enter judgment enforcing the entire arbitration

award because it required Maslowe to file reports and pay fringe-benefit contributions in the future. The district court feared that the Funds intended to file civil contempt charges against Maslowe like it had done against Electric One. In light of the court's refusal to fully enforce the arbitrator's award, the union moved to dismiss its action, and the district court dismissed the case without prejudice.

A refusal to cite a party for civil contempt is not reviewable as a final decision under 28 U.S.C. §1291 if the motion for contempt is part of an ongoing case, but is reviewable if, as in this case, the civil contempt motion ends the case. *Sanders* v. *Monsanto Co.*, 574 F.2d 198 (5th Cir. 1978). Dismissal of a case, even without prejudice, is also reviewable as a final decision under 28 U.S.C. §1291. *E.g., Union Oil Co.* v. *Service Oil Co.*, 766 F.2d 224 (6th Cir. 1985).

A district court's decision concerning the grant or denial of a civil contempt petition is an "abuse of discretion" question. *NLRB* v. *Cincinnati Bronze,* 829 F.2d 585 (6th Cir. 1987). In reviewing a district court's refusal to enforce an arbitration award, we review questions of law *de novo* and questions of fact under a "clearly erroneous" standard.

The district court did not abuse its discretion here when it refused to hold Electric One or its officers in civil contempt of court. A district court has great latitude in determining whether a party is in contempt of court. In this case, the district court determined that Electric One was not in strong financial shape and its ability to pay the fringe-benefit contributions was not assured. In addition, the Funds had an adequate remedy for breach of the collective-bargaining agreement because they could sue for breach of the collective-bargaining agreement whenever Electric One failed to pay contributions or failed to file the appropriate reports. The district court did not abuse its discretion by refusing to cite Electric One and its principal officers for contempt under these circumstances.

Sound public policy also requires that Electric One and its officers not be held in contempt. Allowing some creditors of a financially-strapped corporation to use the weapon of contempt against the officers of the corporation for failure to pay obligations promotes an unfair distinction between creditors which thwarts the purposes of the Bankruptcy Code. Although Electric One had not filed for bankruptcy at the time of the Funds' suit, the Funds were certaining trying to position themselves to gain a preferred position, or preferred payments, if Electric One was not able to pay all its obligations. The district court wisely refused to hold Electric One and its officers in contempt.

We must remand the case concerning Martin Maslowe because the record is not clear whether the arbitrator's decision against Maslowe was grounded in the collective-bargaining agreement. Arbitration is a fundamental component of federal labor law, and district courts may refuse to enforce arbitrators' decisions only if the arbitrator has no power under the agreement to reach the decision that he or she reaches. *See, e.g., United Paperworkers Int'l Union, AFL-CIO, et al.* v. *Misco, Inc.*, 484 U.S. 29, 37-39 (1987)("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."). In the Funds' suit against Maslowe & Co., the record does not contain sufficient information to determine whether the arbitrator acted within the authority conferred on him by the collective-bargaining agreement. Therefore, it is impossible to determine whether the district court should have enforced the arbitrator's decision. On remand, the district court should examine the collective-bargaining agreement and the arbitrator's decision and determine whether the arbitrator exceeded his or her authority under the contract. If the arbitrator did not exceed his or her authority, the district court must enforce the arbitrator's decision.

If the district court does enforce the arbitrator's decision and the Funds later proceed to file contempt charges against Maslowe, the

court will have discretion whether a contempt citation is appropriate.

For the foregoing reasons, the judgment of the district court is affirmed in No. 92-1074; No. 92-1106 is remanded to the district court for further consideration consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELECTRICAL WORKERS' PENSION
TRUST FUND OF LOCAL UNION #58,
IBEW; et al., trust funds,
established under and
administered pursuant to,
federal law,
Plaintiffs,

-vs-

ELECTRIC ONE, INC., a corporation
incorporated under the laws of the
State of Michigan,
Defendant.

Case No. 89-CV-72967-DT
Hon. Patrick J. Duggan

OPINION

This is an appeal from a magistrate judge's order denying a motion for contempt based upon this Court's May 24, 1990 judgment enforcing an arbitration award.

I.

Electric One, Inc. ("Electric"), as employer, entered into a collective bargaining agreement (the "Agreement") with Local Union #58 of the International Brotherhood of Electrical Workers, AFL-CIO (the "Union"). On March 9, 1989, the Union filed a grievance alleging Electric breached the Agreement by failing to file reports and make required fringe benefit contributions. After a March 23, 1989 hearing, an arbitration award was issued in the Union's favor. The award ordered Electric, *inter alia,* to remedy its violations of the Agreement by "[h]ereafter filing all reports and paying all fringe benefit contributions on a timely basis as required by Article VIII." (March 27, 1989 Award of the Labor-Management Committee at para. C). Electric did not comply, and

on October 6, 1989, plaintiff-appellants[1] filed suit in this Court to enforce the arbitration award.[2] IBEW #58 prevailed in its claims against the corporation, and on May 24, 1990, this Court entered judgment against Electric. That portion of the May 24 judgment that is the subject of this appeal pertains only to this Court's granting of injunctive relief by way of incorporating paragraph C of the Labor-Management Committee's award into the judgement.[3]

II.

On May 20, 1991, IBEW #58 filed its "Motion for Contempt Against Defendant and Pamela R. R. Raitt and Wilbert Roberts," alleging that Electric "[a]lmost immediately after entry of judgment, and in violation thereof,... began to again violate the fringe benefit provisions of the labor agreement."[4] Because Roberts and Raitt were dismissed from this case with prejudice, IBEW #58 relies on Fed.R.Civ.P. 65(d) and cases which interpret the scope of Rule 65(d) in seeking to obtain an order of contempt against them.[5] Plaintiff-

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[1] There are seven plaintiff-appellants, Electrical Workers' Pension Trust Fund of Local Union #58; Electrical Workers' Joint Board of Trustees Vacation Fund; Electrical Workers' Insurance Fund; Supplemental Unemployment Benefit Fund of the Electrical Industry, Detroit, Michigan; IBEW #58 Annuity Fund; National Electrical Benefit Fund; and the Joint Apprenticeship Training Trust Fund, all of whom shall hereinafter be referred to as "IBEW #58" or "plaintiff-appellants."

[2] Plaintiff-appellant named Electric, Wilbert Roberts and Pamela R. R. Raitt as defendants. Roberts and Raitt are father and daughter, and officers of Electric. IBEW #58 sought to hold the individual defendants liable for the corporation's violations of the Agreement under an "alter ego" theory. This argument was unsuccessful, and IBEW #58s' claims against Roberts and Raitt were dismissed with prejudice on August 16, 1990.

[3] The judgment entered on May 24, 1990, provided at paragraph 1: "1. The award of the Joint Labor-Management Committee, a copy of which is appended hereto as Exhibit C, be, and it is hereby, adopted, ratified and confirmed. Defendant Electric One, Inc., shall fully comply with said award."

[4] (Memorandum in Support of Motion For Contempt at 5). Plaintiff-appellants expressly limited the contempt motion to the alleged contemptuous conduct in connection with the injunctive relief granted wherein Electric was ordered to file all reports and pay all fringe benefit contributions on a timely basis as required by Article VIII of the Agreement. (*Id.* at n.5).

[5] "Every order granting an injunction... is binding only upon the parties to the action, their officers,..." Fed.R.Civ.P. 65(d). IBEW #58 does not cite Rule 65(d), however, it is clear from the cases cited in their pleadings that this is the rule relied upon.

appellants contend Raitt and Roberts are officers of Electric and because "[a] command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs," this Court should hold them in contempt as well as defendant Electric. (Memorandum in Support of Plaintiffs' Appeal From Magistrate Judge's Order Denying Plaintiffs' Motion for Contempt at 9).

Plaintiffs-appellants' motion was referred to Magistrate Judge Lynn Hooe, Jr. on May 21, 1991, who scheduled a June 18, 1991, hearing.[6] Electric filed a response the day before the hearing admitting the fringe benefit reports were filed late and that it had not paid the contributions required by the reports. Electric stated that their noncompliance with this Court's judgment "is a direct result of the financial inability of Electric One, Inc. to satisfy the monetary portion of the judgment and such inability is a valid affirmative defense to a charge of civil contempt." (Defendant's Reponse to Plaintiffs' Motion for Contempt at 3). Electric moved that plaintiff-appellants' motion for contempt be dismissed pursuant to the "Order of Dismissal entered on August 16, 1990"[7] and "Defendant Electric One's financial inability to comply." (*Id.* at 3; Memorandum in Support of Defendant's Response to Plaintiffs' Motion for Contempt at 5).

During the hearing before Magistrate Judge Hooe, IBEW #58s' counsel conceded Electric had submitted all required reports and that it was proceeding only for the failure of Electric to pay monies owing based upon those reports.[8] The hearing transcript indicates

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[6] The May 21 Order of Reference incorrectly cited 28 U.S.C. §636(b)(1)(A). On June 24, 1991, a "Corrected Order of Reference" was issued pursuant to 28 U.S.C. §636(b)(3).

[7] This Order dismissed the individual defendants, Raitt and Roberts.

[8] (June 19, 1991 Transcript of Hearing on Plaintiffs' Motion for Contempt at 14 [hereinafter *Hearing*]). Reports were due only through November, 1990 because thereafter the corporation was "inactive and no longer doing business." (*Id.* 4-6). Counsel for the corporation explained Electric "simply could not exist under the collective bargaining agreement and pay union scale for the level of work that they were generating, and they're basically out of business." (*Id.* at 6). Electric retained its corporate status "in terms of the State of Michigan" as of the hearing date, i.e., it had not been dissolved, but it had no contracts, employees, bank account or assets. (*Id.* at 6, 7).

Magistrate Judge Hooe believed IBEW #58 should file a new action against Electric, Raitt, and Roberts for violations of the Agreement which occurred after May 24, 1990, and that an adjudication of civil contempt was not warranted. (*Hearing* at 31-35). Consequently, plaintiff-appellants' motion for contempt was denied without prejudice by order dated July 23, 1991.

III.

On July 31, 1991, plaintiff filed its Appeal From Magistrate Judge's Order Denying Plaintiffs' Motion for Contempt, which is now pending before this Court. Initial review of a magistrate judge's decision issued under the authority of 28 U.S.C. §636(b) rests with the district court. *Gleason* v. *Sect. of Health & Human Serv.*, 777 F.2d 1324 (8th Cir. 1985). Section 636(b)(3) permits assignment to magistrates of "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. §636(b)(3); *see also* App. C, Rule C-1(j)(17) Local Rules United States District Court for the Eastern District of Michigan. Although §636(b) does not expressly provide for dispoosition by the magistrate judge of post-judgment proceedings, such disposition has been held to come within the "additional duties" clause of §636(b)(3). *Bache Halsey Stuart Shields, Inc.* v. *Killop*, 589 F.Supp. 390, 393 (E.D. Mich. 1984).

Civil contempt is punishable, at the court's discretion, by fine and/or imprisonment, and is committed when a person violates an order of a court requiring in specific and definite language that a person do or refrain from doing an act. *Lichtenstein* v. *Lichtenstein*, 425 F.2d 1111, 1113 (3d Cir. 1970). It is well settled that courts possess broad discretion in enforcing civil contempt and in fashioning sanctions. *See N.L.R.B.* v. *Cincinnati Bronze, Inc.*, 829 F.2d 585, 591 (6th Cir. 1987). A party seeking to have an adversary held in contempt must establish by clear and convincing evidence that the adversary has in fact violated a binding court order. *See United States* v. *Smallwood*, 870 F.2d 868 (6th Cir. 1989)(unpublished opinion) (citing *Donovan* v. *Sovereign Security, Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984)).

This Court's May 24, 1990 judgment enforcing the Joint Labor-Management Committee's award is an equitable decree compelling obedience under threat of contempt, and is therefore an order granting an injunction within the meaning of Rule 65(d). *Int'l Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 75, 88 S.Ct. 201, 207 (1967). Rule 65(d) permits injunctions to be binding upon the officers of parties to an action. Roberts and Raitt were officers of Electric, and as such, are potentially subject to the mandates of this Court's May 24 judgment, despite being dismissed individually from the suit. *See N.L.R.B.* v. *Sequoia Dist. Council of Carpenters,* 568 F.2d 628 (9th Cir. 1977). However, before Electric's allegedly contemptuous conduct can be imputed to its officers, it must first be determined whether the corporation should be held in contempt of this Court's judgment of May 24, 1990.

Applying either a clearly erroneous in fact or contrary to law standard of review or a *de novo* review, the magistrate judge's order dismissing plaintiff's motion for contempt should be affirmed. "Civil contempt, punishable by fine and/or imprisonment, is committed when a person violates an order of a court requiring in specific and definite language that a person do or refrain from doing an act." *Baumrin* v. *Cournoyer,* 448 F.Supp. 225, 227 (D.Mass. 1978) (citing *Lichtenstein, supra*). As in *Baumrin* and *Lichtenstein,* the court order which plaintiff seeks to enforce pursuant to the judgment does not specify the amount of money that defendant should pay to plaintiff.[9]

In this Court's opinion, the lack of specificity in the order seeking to be enforced is a factor to be considered by the Court in deciding whether or not to enforce an order by contempt proceedings. "It is settled law that contempt will not lie for violation of an order of the court unless the order is clear and decisive and contains no doubt about what it requires to be done." *N.L.R.B.* v. *Deena Artware, Inc.,*

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[9] The court in *Baumrin* based its decision, in part, on the fact that the motion for contempt lacked the requisite specificity to sustain an adjudication of contempt for failure to perform the act of payment. *Baumrin,* 448 F.Supp. at 227.

261 F.2d 503 (6th Cir. 1958), *rev'd on other grounds,* 361 U.S. 398, 80 S.Ct. 441, L.Ed.2d (1960).

The Court has broad discretion in exercising its power to issue an order of contempt. *See Cincinnati Bronze,* 829 F.2d at 591; *Skorupskas,* 605 F.Supp. at 944. A coercive remedy for failing to comply with an obligation to pay money is committed to the discretion of the Court and should only be invoked in the most compelling circumstances. *Baumrin,* 448 F.Supp. at 227; *Dunlop* v. *Fisher,* 406 F.Supp. 760, 761 (D.Colo. 1976). In this Court's view, plaintiff-appellants have not shown compelling circumstances to justify the coercive remedy of civil contempt. The availability of a less harsh avenue of legal relief[10] persuades this Court that there exists no compelling reason to warrant the severe sanction of civil contempt.[11]

IV.

The magistrate judge's order denying plaintiffs' motion for contempt shall be affirmed. An order consistent with this opinion shall be issued forthwith.

DATED: December 23, 1991

/s/ PATRICK J. DUGGAN

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[10] Plaintiff, of course, has the right to file a complaint, obtain a judgment for any monies due, and then seek enforcement of the judgment through post judgment remedies available to any judgment creditor.

[11] In addition, there are strong indications that Electric has a valid affirmative defense of financial inability to comply. *See United States* v. *Lay,* 779 F.2d 319 (6th Cir. 1985). However, since the magistrate judge did not make a finding of fact with regard to this issue, we do not rely upon this factor in affirming the order denying plaintiff-appellants' motion.

United States District Judge

Pursuant to Rule 77(c), Fed.R.Civ.P.
copies mailed this date to the
following parties:
Sheldon M. Meizlish, Esq.
John R. Urso, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELECTRICAL WORKERS' PENSION
TRUST FUND OF LOCAL UNION #58,
IBEW; et al., trust funds,
established under and
administered pursuant to,
federal law,
Plaintiffs,

-vs-

ELECTRIC ONE, INC., a corporation
incorporated under the laws of the
State of Michigan,
Defendant.

Case No. 89-CV-72967-DT
Hon. Patrick J. Duggan

/

ORDER AFFIRMING DENIAL OF PLAINTIFF-APPELLANTS' MOTION FOR CIVIL CONTEMPT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on December 23, 1991.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

This is an appeal from a magistrate judge's order denying a motion for contempt based upon this Court's May 24, 1990 judgment enforcing an arbitration award. For the reasons stated in the Opinion issued this date, this Court has determined that Magistrate Judge Hooe's July 23, 1991 Order Denying Plaintiffs' Motion for Contempt was proper. Accordingly,

IT IS ORDERED that Magistrate Judge Hooe's July 23, 1991 order is AFFIRMED.

DATED: December 23, 1991

/s/ PATRICK J. DUGGAN
United States District Judge

Pursuant to Rule 77(c), Fed.R.Civ.P.
copies mailed this date to the
following parties:

Sheldon M. Meizlish, Esq.
John R. Urso, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELECTRICAL WORKERS' PENSION TRUST FUND OF LOCAL UNION #58, IBEW; et al., trust funds, established under and administered pursuant to, federal law,
Plaintiffs,
-vs-
ELECTRIC ONE, INC., a corporation incorporated under the laws of the State of Michigan, et al, jointly and severally,
Defendants.

Case No. 89-CV-72967-D
Hon. Patrick J. Duggan

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ORDER DENYING PLAINTIFFS' MOTION FOR CONTEMPT

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan on July 23, 1991.

PRESENT: HON. MAGISTRATE LYNN HOOE
UNITED STATES DISTRICT JUDGE

This matter having been brought on for hearing on Plaintiff's Motion For Contempt, and the Court having had an opportunity to hear arguments of counsel, and the Court having reviewed the Orders of May 24, 1990 and August 16, 1990;

NOW, THEREFORE, IT IS ORDERED that Plaintiff's Petition for Contempt (dated May 17, 1991) be and is hereby denied without prejudice.

/s/ MAGISTRATE JUDGE LYNN HOOE
United States District Judge

Approved as to Form:

SHELDON M. MEIZLISH (P17601)
Attorney for Plaintiffs

JOHN R. URSO (P21687)
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELECTRICAL WORKERS' PENSION
TRUST FUND OF LOCAL UNION #58,
IBEW; et al., trust funds,
established under and
administered pursuant to,
federal law,
Plaintiffs,

-vs-

ELECTRIC ONE, INC., a corporation
incorporated under the laws of the
State of Michigan, et al., jointly
and severally,
Defendants.

Case No. 89-CV-72967-DT
JUDGE: HON. PATRICK J. DUGGAN

JUDGMENT AGAINST DEFENDANT ELECTRIC ONE, INC.

At a session of said Court, held in the U.S. Courthouse,
Detroit, Michigan, on May 24, 1990.

PRESENT: HONORABLE PATRICK J. DUGGAN
United States District Judge

This matter having come on to be heard on the 5th day of April, 1990, on Motion for Summary Judgment filed by the Electrical Workers' Pension Trust Fund of Local Union #58, IBEW, et al., plaintiffs herein; and the Court, after having been fully advised, having concluded (for reasons stated on the record) that the motion should be granted in part and denied in part.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The award of the Joint Labor-Management Committee, a copy of which is appended hereto as Exhibit C, be, and it is hereby, adopted, ratified and confirmed. Defendant Electric One, Inc., shall fully comply with the said award.

2. Plaintiffs, the Electrical Workers' Pension Trust Fund of Local Union #58, IBEW, et al., shall recover of defendant Electric One, Inc., the sum of $58,614.07,[1] with interest to accrue on said amount from the 5th day of April, 1990, as provided for in 29 U.S.C. §1961, and plaintiffs shall have execution therefor.

3. With respect to the said defendant, Electric One, Inc., this Judgment shall be fully enforceable.

4. Insofar as defendants Wilbert Roberts and Pamella R. R. Raitt are concerned, and as to those two (2) defendants only, plaintiffs' Motion for Summary Judgment be, and it is hereby, denied.

Rule 54(b) Certificate

5. With respect to the matters adjudicated herein, the Clerk is directed to enter a final judgment, there being no just reason for delay.

/s/ PATRICK J. DUGGAN
United States District Judge

Approved as to form:

SHELDON M. MEIZLISH
Attorney for Plaintiffs

JOHN R. URSO
Attorney for Defendants

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[1] Representing said defendant's indebtedness to plaintiffs for contributions through November 28, 1989 ($42,145.96), plus interest on such contributions ($2,308.00), liquidated damages ($13,995.11) and taxable costs ($165.00).

LABOR MANAGEMENT COMMITTEE

ELECTRICAL CONSTRUCTION INDUSTRY
DETROIT AND VICINITY
25180 Lahser Road — P.O. Box 385
Southfield, Michigan 48037
(313) 355-3500

AWARD OF THE LABOR-MANAGEMENT COMMITTEE

TO: Electric One, Inc.
22450 Tower Court
Suite 201
Novi, MI 48050

At the hearing of the Labor-Management Committee, held on March 23, 1989, you were found guilty of the charges specified against you in the Demand for Arbitration of Grievance dated March 9, 1989 filed by Local Union 58, International Brotherhood of Electrical Workers.

The Labor-Management Committee orders you to remedy your violations of the Agreement and Working Rules by:

A. Submitting the fringe benefit reports due to the date of this decision as required by Article VIII of that agreement, *and*

B. Paying the amounts shown on those reports as due immediately, including the liquidated damages due thereon, *and*

C. Hereafter filing all reports and paying all fringe benefit contributions on a timely basis as required by Article VIII.

DATED: March 27, 1989

LABOR-MANAGEMENT COMMITTEE
ELECTRICAL CONSTRUCTION INDUSTRY
DETROIT AND VICINITY

/s/ ROBERT M. TALBERT